DOCUMENT RESUME

ED 101 677 IR 001 527

TITLE	Libraries and Copyright; A Summary of the Arguments for Library Photocopying.
INSTITUTION	American Library Association, Chicago, Ill.
PUB DATE	Jun 74
NOTE	51p.
EDRS PRICE	MF-$0.76 HC-$3.32 PLUS POSTAGE
DESCRIPTORS	*Copyrights; Court Litigation; Federal Legislation; Information Dissemination; *Legal Problems; Libraries; *Library Services; *Publishing Industry; *Reprography; State of the Art Reviews
IDENTIFIERS	Fair Use; *Williams and Wilkins

ABSTRACT

This booklet is an attempt to provide librarians with a short summary of the arguments in favor of library photocopying, combined with a status report on how these arguments have fared in the courts and in the United States Congress. Following an analysis of the issues involved, the case of Williams and Wilkins v. the United States is discussed, with a presentation of the arguments of the American Library Association, the Association of Research Libraries, and the National Library of Medicine followed by the reactions of the library community. Part 2 of the booklet reviews congressional action on copyright and includes the photocopying provisions of Senate Bill 1361. (Author/SL)

BEST COPY AVAILABLE

ED1016777

LIBRARIES AND COPYRIGHT

A SUMMARY OF THE ARGUMENTS FOR LIBRARY PHOTOCOPYING

U.S. DEPARTMENT OF HEALTH
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

IR 001 527

The American Library Association

BEST COPY AVAILABLE

PREFACE

This booklet is an attempt to provide librarians with a short summary of the arguments in favor of library photocopying, combined with a status report on how these arguments have fared in the courts and in Congress. It does not pretend to shed startling new light on the subject of copyright, nor does it propose to be a source document for lawyers' debates. This is a partisan document. It sets forth primarily the librarians' side of the debate. But only if librarians are aware of the issues and can effectively present their case will a reasonable solution to the photocopying problem be possible.

No portion of this booklet is copyrighted. Reproduction by photoduplication or any other means is not only permitted but sincerely encouraged.

--Christopher Wright
Assistant Director
Washington Office
American Library Association

June 1974

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY

ALA

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER.

CONTENTS

Preface

The Issues . . . . . page 1

The Essence of the Argument . . . . . page 3

Williams & Wilkins v. The United States . . . page 6

The Argument of the American Library Association . . . . . page 8

The Argument of the Association of Research Libraries . . . . page 12

The Argument of the National Library of Medicine . . . . . page 14

The Report of the Commissioner . . . . . page 16

The Reaction of the Library Community . . . . . page 19

The Decision of the Full Court of Claims . . . . . page 26

Congress and Copyright . . . . . page 34

Photocopying Sections of S. 1361 . . . . page 40

Conclusion . . . . . page 44

Footnotes

THE ISSUES

Librarians since Herbert Putnam have been warily watching the development of copyright law in the United States, aware of its importance to the country's tradition of library service. In recent years the Williams & Wilkins suit and the growing controversy over photocopying have placed the public's right to information in a new and critical perspective.

Copyright is, essentially, the right of an author or artist to benefit from the sale of the product of his intellectual labor. Article 1 Section 8 of the U.S. Constitution establishes this right when it says, "The Congress shall have power ... to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

In the current argument publishers claim that by offering photocopies of material in the library to patrons through interlibrary loan, libraries are infringing on the author's right. On the other hand, librarians assert that the public has a right to published material on the library shelves and that the right of readers to copy this material, whether on a photocopy machine or with a quill pen, is guaranteed in the Constitution by the phrase "to promote the progress of science and the useful arts."

More important than the simple monetary question of whether the public ought to pay a royalty for photocopies of material in the library is the basic question of whether a publisher has the right to prohibit any reader from making any kind of copy which is not intended for resale. Copyright law proscribes the "publication" of someone else's work. But a reader who asks for a photocopy of an article from Time magazine is hardly in the business of "publishing" Time.

Thus, the issue becomes whether a publisher can stop a reader from copying (or having his agent, the library, copy) a portion of a published work. Can the publisher cut off the reader's access to information unless the reader pays an arbitrary royalty fee?

Involved in this debate over the right of libraries to photocopy material that they own is the ultimate question of how America's libraries will adapt to modern technology -- to systems management, computerized data storage and expanding communications networks.

If pending copyright legislation cuts back sharply on the practical opportunities for libraries to use modern photoduplication and transmission techniques to share resources it will put an end to far-reaching cooperative

ventures and return libraries to the simple, homely pattern of the 19th century. If the courts decide that a publisher has a right to collect royalties for every page of an article reproduced on a library photocopying machine, curtailing the ability of the library to make the materials already on the shelves available to a larger public than the man standing in front of the check-out desk, a major attempt to provide access to information will have been cut short.

Libraries are already in a state of precarious financial health. The increased burden of royalty payments and institutional subscription charges for the privilege of photocopying will mean in many cases library patrons will do without. The penalty will fall equally on users of the small rural library and the major research institution. Unable to borrow, buy or lend, libraries will revert to isolated collections offering readers limited resources at best.

Barbara Ringer, the Register of Copyrights, has called the current stalemate over photocopying "the most dangerous, most difficult and the most urgent problem" facing the library/publishing community today.1/ Until this question is settled, the future of new library management techniques and acquisition policies remains in limbo.

What will a hard-line approach to photocopying do to a burgeoning regional science information network, for instance? Or how much value will a computer-generated microfiche system be for copyrighted materials under a new copyright law? Even basic day-to-day questions are affected. How many copies of a journal will you retain at the end of a year if you aren't permitted to photocopy it? How much will you budget for postage if it means sending the whole book to a patron instead of just a copy of the title page?

For these reasons it seems important that librarians have a simple digest of the issues at stake in recent copyright developments.

This booklet doesn't pretend to give all the arguments of one side, much less both sides. It seeks to give, in concise a form as possible, the reasons why librarians should be concerned with copyright. It includes a description, in the words of the library profession's own spokesmen, of the issues involved in the Williams & Wilkins case, the principal copyright litigation at this moment, plus portions of the opinions of the original hearing examiner and subsequently of the Court of Claims in the case.

The booklet also describes recent trends in copyright legislation and what this might mean for libraries and the public. Excerpts of relevant portions of the latest copyright bill before Congress (S. 1361) and comments on the draft committee report on the bill are also included.

Finally, a general conclusion follows adding a few thoughts on the social and economic issues underlying the current debate over copyright.

THE ESSENCE OF THE ARGUMENT

Behind the skirmish lines, sniping away from one outpost or another, two main bodies of opinion may be forming. The martial analogy is closer to Vietnam than to Waterloo but two main-force positions can be identified amidst the swirl of debate.

--Ralph S. Brown, Jr.
Professor of Law, Yale Law School

from "Copyright: An Overview" in
Libraries At Large

In 1968 the National Advisory Commission on Libraries and Information Science asked Dan Lacy, senior vice-president of McGraw-Hill, and Verner Clapp, then a consultant for the Council on Library Resources, to prepare essentially opposing papers on copyright for the Commission. The two points of view, titled "Copyright: A Proprietor's View" and "Copyright: A Librarian's View" were subsequently printed in the Commission's opus, Libraries at Large, with an introductory essay by Ralph S. Brown, Jr., a Yale law professor and copyright specialist.[2]

All three men wrote with an eye on Capitol Hill and the proposed Copyright Revision Bill[3], a measure which has yet to emerge after three subsequent Congresses. Lacy stressed that there was little essential difference between the views of librarians and those of publishers. A publishing industry stimulated by anti-photocopying legislation would quickly and cheaply come to the aid of librarians and teachers in need of multiple copies, he suggested. Brown argued that concessions must be made by both sides, but he supported the basic theory that libraries would sooner or later have to pay some kind of licensing fee for photocopying. "The new technologies with their speed and abundance, raise formidable challenges of convenience and efficiency to the copyright system," he wrote. "The costs of clearance, that is, of obtaining information about claims to copyright, must be brought down, and the costs of using copyright works bargained out. That is where the main effort is needed."

Verner Clapp, however, asserted that the word "copy" contained in the 1909 copyright statute[4] applied specifically to the copying of artistic creations, not literary productions; that the authors of the law had even

expected libraries to photocopy copyrighted materials; and, in short, that both historically and textually the publishers hadn't a leg to stand on. His opening salvo set the tone of the work" "A principal purpose--in some senses the principal purpose--for which libraries exist is to facilitate the copying of relevant documents."

Six years later the Clapp paper continues to be an extremely forceful statement of the librarian's position. Tracing back the history of the word "copy" in today's copyright law, Clapp showed that the word came from an English law of 1735 which dealt with reproductions of prints, which was termed "copying" as opposed to the reproduction of books, which was termed "printing."5/

"In the first general revision of the United States copyright law (1831) music was added to the publications previously covered by copyright. But now for purposes of specifying infringement the classes of publications subject to copyright were divided into two categories, differentiated by method of multiplication of copies. One section of the law dealt with publications multiplied from type, namely books; this specified infringement as to print. The other dealt with publications typically multiplied from plates, namely, maps, charts, prints and music; this specified infringement as to copy.6/

"The second general revision of the United States copyright law took place in 1870.7/ This added paintings, drawings, chromos, statues, statuary and other art works to the classes of material subject to copyright. Hitherto the basic right of copyright, that of multiplication of copies, had always been expressed through the use of the terms "print" and "reprint." It was obvious that these terms did not aptly describe the multiplication of copies of paintings and statues. In consequence, the verb copy (in its participial form) was borrowed from the infringement section for prints and other plate-produced publications of the previous act and inserted in the specification-of-copyright section of the new act. This now read as follows:

> [A]ny citizen of the United States, or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts...shall... have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same...

"Here the verb copy was for the first time associated with books. But it was clear that it did not apply to books, for the infringement sections of the act still separated the type-produced publications (books) from the others and still specified infringement for the former as to print and infringement for the latter as to copy. Any claim of exclusive right to copy a book based on the presence of this word in the specification-of-copyright section would have foundered on its omission in the infringement section."

But when the 1909 act was drafted the detailed specifications for

infringements were combined and the verb "copy" was included with the book-oriented words "print, reprint, publish."

"In summary, the exclusive right to copy was created in 1909 as the result of two accidents of bill drafting. The first of these had occurred in 1870 when the verb copy (in the participial form) was added to the specification of copyright in order to describe the multiplication of copies of works of art. The second was in 1909 when the application of the word was permitted to extend to books and other copyrightable works as the result of the dropping of the detailed specification of infringements which had until then restricted the application of the word to the multiplication of copies of publications printed from plates and of works of art. The previous use of the word in copyright law (beginning in 1735) had been as the equivalent of to "print", i.e. to mass-produce copies for purposes of publication; and there is nothing in the legislative history of the Act of 1909 to suggest that its meaning was there being changed or that the framers of the law had any intention whatever of extending its meaning to single-copying. In consequence, it is incorrectly presumed to apply to the making of single copies."

Brushing aside the publishers' claims that photocopying was cutting into their rightful markets, Clapp suggested "...it may be suspected that it is not so much the loss of sales of copies that copyright proprietors object to as the loss of opportunity to realize an additional profit from the photocopying. But as pointed out earlier, (a) it is not the policy of the United States copyright law to extend copyright to non-profit uses of copyrighted works where publication of the work is not involved; and (b) the subservience of the interest if the copyright proprietor to the public interest sometimes requires the foregoing of potential profit. This would appear to be one of those occasions."

Finally, he said, copying in libraries is only one of many occasions in which photocopies are made of copyrighted material.

"It may be pointed out that many more copying devices exist in commercial, industrial, business, professional and even in domestic establishments than in libraries. It would be impossible to police the use of the former. It would be discriminatory to extend copyright to the use of the latter merely because it is possible to police them.

"By the same token any attempt to extend copyright to library copying would be self-defeating. As has been cogently stated "[I]t would cost dimes to collect pennies" from the copying devices in libraries[8]."

WILLIAMS AND WILKINS VS. THE UNITED STATES

"The probable effect on scientific progress goes without saying, but for this part of our discussion the significant element is that plaintiff, as publisher and copyright owner, would not be better off. Plaintiff would merely be the dog in the manger."

-- Judge Oscar H. Davis
U.S. Court of Claims

in the majority opinion
Williams & Wilkins vs. U.S.,
November 27, 1973

On May 1, 1967, Dr. Martin Cummings, Director of the National Library of Medicine, received a letter from William M. Passano, Chairman of the Board of the Williams & Wilkins Company, a publisher of medical journals in Baltimore, Maryland.

The letter said, in part, that "since NLM may, from time to time, be requested to make copies of articles from journals published by the Williams & Wilkins Company, it seemed desirable that I explain to you our policy in this matter. We are glad to give our permission for the copying of articles which appear in our journals provided the person making the copies pays us a royalty of 2¢ per page per copy for the privilege of copying the material on which we hold the copyright.

"In the absence of a royalty payment, no one has our permission to copy this material and any copying which should take place we would consider to be an infringement of our copyright ..."

Thus began the seven-year saga of Williams & Wilkins vs. the United States which has now reached the Supreme Court.

Cummings immediately halted photocopying of all Williams & Wilkins journals on the library shelves and referred the letter to the general counsel for the Department of Health, Education and Welfare, the parent agency for NLM. On May 29, on the advice of HEW General Counsel A.W. Wilcox, Cummings wrote Passano saying the government felt the library's procedures were fully covered by the judicial doctrine of fair use (which traditionally allowed research use of copyrighted works) and that photocopying of Williams & Wilkins journals would be resumed.

Meanwhile, Passano had written Dr. F.J.L. Blasingame, Executive Vice-President of the American Medical Association, requesting that AMA stop photocopying the company's journals without paying royalties. "Otherwise, you and we and the country can look forward to a bitter future of complete government subsidy and control of your and our scientific press," he wrote. "While I realize there will be an increase in your clerical overhead to set up a copying royalty payment plan to private publishers ... I would hope the AMA, in taking the initial national leadership in this, could demonstrate the feasibility of such an operation.... We expect no help from the empire-builders within the government on this matter."

On August 11, Passano, his attorney and his marketing director met with Cummings and NLM officials and again proposed that the library should pay royalty fees. Cummings again asserted that the library's photocopying was fair use and offered to let Williams & Wilkins station a man where the copying was done to observe the operation. The company declined this offer, which was repeated in August. During the end of September Cummings provided company employees with the last six months' photocopy slips and a special place in the library to work, plus the draft of a controlled sample survey of the library's interlibrary loan operation.

On February 27, 1968 the Williams & Wilkins Company filed suit in the U.S. Court of Claims alleging eight counts of copyright infringement against the U.S. Government, specifically, the National Library of Medicine, and the library of the National Institutes of Health. The libraries had violated the law "by copying, printing, reprinting, publishing, vending and distributing said work, all in violation of plaintiff's rights," the firm said.

After a lengthy trial in which the various library associations, the Association of American Publishers and the Authors League joined as amici curiae, Commissioner James F. Davis issued an opinion on February 16, 1972 favoring Williams & Wilkins. The case was then scheduled for a full-dress hearing before the seven-judge Court of Claims.

In early March the publisher sent a digest of the opinion to its subscribers and proposed a "reasonable annual license fee" in lieu of itemized royalty payments.

Later that spring Williams & Wilkins dealers were informed in a letter sent by Patricia Morris, head of the firm's subscription department, that institutional rates would be enforced for 1973 subscriptions, raising the price of journals an average of $3.65.

A leaflet titled "Instructions for Photocopying" informed subscribers that the increased rate included "an automatic license to make single-copy photocopies for library patrons in the regular course of library operations". but not for interlibrary loans which "may be made upon remittance of 5¢ per page per copy made."

A further advisory to libraries emphasized "a license such as that in the institutional subscription rates is a legal requirement in order for you to make photocopies."

On June 23 Cummings and the regional medical libraries served by NLM were informed by Williams & Wilkins that NLM would be assessed the institutional rate, which would allow in-house photocopying, and that NLM would be expected to pay 5¢ per page royalty for any interlibrary copying done.

Cummings replied on June 31 that NLM would pay the increased subscription charges but would not agree to the publisher's claim that it was licensing NLM to photocopy and would not pay the 5¢ per page royalty.

A letter to Cummings from Charles O. Reville Jr., President of Williams & Wilkins, on September 15 retracted the licensing implication while court action was pending. "We assure you that your subscriptions to our journals at the institutional rates will in no way constitute agreement with our position and the need for a photocopying license," he wrote. "Furthermore, we accept your suggestion that we refrain from implementing our current proposal on compensation for single-copy inter-library loan photocopying."

On October 2 a general letter from Passano to "Our Customers and Friends" confirmed this decision on the part of the publisher. "Our new institutional rates, which we shall continue to request, shall have no connection whatever with a license to photocopy, implied or otherwise," the letter said.

Twenty-one months after the commissioner's original opinion, the full Court of Claims reversed the judgment on November 27, 1973, finding for the government and the library community. On February 20, 1974 the lawyers for Williams & Wilkins appealed the case to the Supreme Court and on May 28 the Court agreed to hear the case the following fall.

The Williams & Wilkins case represents a major effort on all sides to reconcile modern technology with a 65-year-old copyright law badly in need of updating.

In the following short passages taken from the briefs filed by NLM, the Association of Research Libraries and the American Library Association an attempt has been made to outline the critical issues at stake for the libraries. The ALA excerpt describes the relevance of the Williams & Wilkins issues to practices common throughout the library world and emphasizes the importance of the Court's final decision to the future of libraries. The ARL brief gives the historical precedents for copyright legislation in Anglo-American legal tradition and sets forth the Constitutional issues. The NLM brief addresses the issues of copyright and scientific research.

The Argument of the American Library Association

The ALA brief sought to explain in general terms the disastrous effect the Williams & Wilkins demands would have on library service across the country. Arguing that the Constitution granted the copyright monopoly only for the purpose of promoting knowledge, the Association suggested that the publisher's attack on NLM was an indirect attack on practices of scholars which are protected by the legal doctrine of "fair use."

The brief said, in part:

"The position of the ALA is that the mere fact of photocopying alone is not sufficient to establish an infringement of the copyright monopoly. The public policy expressed in the Copyright Clause of the Constitution (U.S. Const. Art. 1, § 8) limits the scope of the copyright monopoly to situations where the enforcement of copyright will 'promote the progress of science and useful arts.' This policy has been implemented by the judicial doctrine of 'fair use.' A scholar who can copy as a fair user under the Constitutional standard can ask a library as his agent or instrumentality to effect the copying for him. Fair use of copyrighted material and the interests of the public therein cannot be subverted by technical niceties concerning who mechanically makes the copy.

"Library photocopying is absolutely essential to the effective dissemination and use of information for purposes of research and study. The urgent needs of readers and libraries in this area are manifest from evidence before this Court. No interest of a copyright owner could be sufficient to warrant the extension of the copyright monopoly to cover library photocopying.

"A desire for additional income is the only interest of the copyright owners at stake in the present litigation. The incentive to publish, which is the prime justification for the copyright monopoly, is not remotely threatened by library photocopying as it has been practiced for the past several decades. The publishers of scientific and technical journals, which are most frequently and almost exclusively the subject of library photocopying, pay nothing to authors for the privilege of publishing the authors' works. Hence, the incentive of these authors to write and to submit their writings to the publishers is not affected by library photocopying. In fact, authors generally favor the wide dissemination afforded to their writings by the practice of library photocopying.

"Similarly, there is absolutely no evidence that the incentive of copyright owners to publish is in danger of injury, much less destruction, due to library photocopying. The plaintiff has not demonstrated that it or any other publisher has suffered any economic injury due to library photocopying of single copies of portions of works for purposes of study or research.

"Williams & Wilkins' sole interest in the present action therefore is based on the tautology that a publisher could make more money if it were suddenly entitled to be paid in respect of an activity - library photocopying - for which it had not previously been paid. Such an interest does not warrant protection under the copyright law, since it is not necessary to or in furtherance of the promotion of science and the useful arts and conflicts with an interest that does comport with this policy - the interest of the public in the continued availability of library photocopies for purposes of study and research. For this reason, it is submitted that traditional library

photocopying practices do not constitute copyright infringement.

THE TECHNICALITY OF A LIBRARY MAKING THE COPY

"It is readily apparent why the plaintiff herein seeks to impose copyright infrigement liability upon libraries rather than attacking their readers directly. The reason is simply that almost all (and perhaps every one) of these readers are not infringers but, rather, are 'fair users.'

"Briefly stated, the doctrine of 'fair use' enables a scholar or researcher under appropriate circumstances to make a copy of a copyrighted work. The principle has been described in the case of Loew's Inc. et al v. Columbia Broadcasting System et al, Inc., ... as follows:

> Thus, in the field of science and the fine arts, we find a broad scope given to fair use. 'This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter.' ... The writer of such works 'invites reviews, comments and criticism' and we could add, the 'use' of the books and portions and quotations therefrom for the purpose of the advancement of learning.
>
> ... ***[T]he law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field [citing cases]. This is permitted in order, in the language of Lord Mansfield in Sayre v. Moore, 1 East 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art' ...

"Surely, a reader who manually copies from a borrowed work consistently with the 'fair use' doctrine could alternatively check out the work from the library and on his own make a mechanical copy of the portion of interest to him without being branded a copyright infringer. A professor of medicine who mechanically copies from a loaned library journal within the confines of his own office is no different legally from his colleague who makes a permissible hand copy in a library reading room.

"Likewise, a library could rent space (as many do) to owners of coin-operated reprographic machines to allow the reader himself to make a 'fair use' copy in the library without manual transcription. And if the library chooses instead to provide the mechanical reproduction as a service to its readers, no substantive difference results.

"It is the character of the reader's use of the copied work that determines the issue of 'fair use' versus illegitimate infringement. The reader's use does not change whether copying is manual or mechanical or whether the reader makes the copy himself or asks a library employee to do it for him.

. . .

THE IMPRACTICALITY OF ROYALTY PAYMENTS

"Aside from whether 'reasonable royalties' or ultimately much more is really the object of the copyright proprietors, the instant suit still poses a grave threat to the public interest in continued library photocopying for several reasons.

"First, all monies a library may be required to spend in payment for or collection of photocopying royalties must be taken from its other functions, such as acquisitions of new materials to improve its collection. Thus, imposition of royalties on library photocopying would necessarily limit access to written works by decreasing the libraries' ability to acquire such works. Moreover, to the extent that the burden of royalties would be passed on to the scientist, researcher, or scholar, such limitations would be even more direct. In this regard, a practicing physician testified:

> There are great variations in interest in getting an article. I mean, some you must have, and others you say you'd like to have, and so on; and I think all of us have that small germ of parsimony, or whatever you call it, and frugality. So that there, very definitely, when you know there is going to be a charge, you, if it is a borderline situation, say, 'Well, I won't bother.'

"And regardless of whose pockets the royalty payments come from, the administrative costs to the libraries in collecting, accounting for, and distributing the royalties would be substantial and could well exceed the amount of royalties collected.

"This Court should consider the practical problems which would be involved were an academic, research, or public library to attempt to secure separate royalty agreements for every copyrighted work in that collection. It should consider the problems of merely determining who the copyright owner is, of negotiating a royalty agreement with him, and of accounting for the royalty payments due under each such agreement.

"There is simply no question that libraries, confronted with the alternative of ceasing all photocopying or seeking royalty agreements from copyright owners, will choose the former. The above-discussed insurmountable problems associated with royalty agreements make it obvious that they really have no alternative.

"Despite plaintiff's calculated attempts to obfuscate the fact, the vital interests of the public in the continuation of library photocopying <u>are</u> at

stake in the present litigation. And plaintiff should not be permitted to beg the question of whether limited library photocopying is in violation of the Copyright Act and subject to damages and injunction by claiming that it happens to be only seeking royalties in this particular action.

. . .

PUBLISHERS' PROFITS VS. PUBLIC INTEREST

"The contention that limited library photocopying results in a loss of revenue to copyright owners is totally without foundation. This could well explain why, until the present suit, limited library photocopying had not been attacked during the fifty year history of the practice. In any event, it is clear that the plaintiff herein was not motivated to institute this action by a loss of revenues, but rather by a desire to reap additional profit. In this regard, the following testimony of the Chairman of the Board of plaintiff is quite revealing:

> Q. And isn't it a fact that Williams & Wilkins Company has never conducted any studies or survey to determine precisely what the effect of photocopying is on its business?
>
> A. ... We have conducted studies of what we think could be charged for photocopying. ...

"The interest of the plaintiff should be recognized for what it really is -- a selfish quest for profit maximization. This interest must give way to the paramount interests of scholars and researchers. The progress of science and the useful arts would be severely hampered by granting copyright owners the right to enjoin limited library photocopying and the concommitant power to maximize their profits in respect thereof. On the other hand, such progress would be nurtured by permitting scholars and researchers the continued access to and use of printed materials in library collections which they have traditionally enjoyed."

. . .

The Argument of the Association of Research Libraries

The brief of the Association of Research Libraries focused on the history of copyright law in this country and in England, emphasizing the difference between library photocopying and the historically protected right of an author to "print, reprint, publish, copy and vend" his work. A library, the ARL brief contended, is hardly taking up publishing and bookselling when it makes a single copy of an article for a scholar. On the other hand, the scholar's right to his copy for the purpose of teaching or research is clearly implied in the history of the law.

Analyzing the legislative history of the 1909 Copyright Act and the record of Supreme Court decisions on copyright, the brief pointed out:

"Both before and after the enactment of the Copyright Act of 1909 the language used by the Supreme Court in describing the 'exclusive right' of an author has made clear that this right has been understood to be no more and no less than a right to multiply copies of a work (by printing, reprinting, or other process) for purposes of publication and sale. The making of a copy of published material for the personal use of a scholar or other reader is not an invasion of this right of reproducing and selling editions of an author's work....

"A library does not multiply copies within the sense of these Supreme Court statements when it makes a single copy for the use of a reader at his request. Multiplications would occur for this purpose only if the library in effect published its own edition of a copyrighted work by making a production run of a significant number of copies for public distribution. This is not the custom of libraries. No such practice is involved in the present case, and no such right is here asserted.

. . .

THE REASON FOR "EXCLUSIVE RIGHTS" OF AUTHORS

"The authority ... provided to the Congress [in Article I of the Constitution] to enact legislation establishing copyright protection for published works is restricted not only by the express requirement that any 'exclusive Right' be limited in duration but also by the general intent and purpose of the clause. Open communication of knowledge and ideas is an essential characteristic of a free society, and the grant of any monopoly (no matter how temporary) to the written expression of knowledge and ideas must be viewed as a special exception which is to be given a scope no broader than the purpose for which the exception is granted.

"In the case of the copyright provision of the Constitution that purpose is clearly stated to be the promotion of 'the Progress of Science and useful Arts ....' Congress has no power to confer any 'exclusive right' under this provision which would not be compatible with the constitutional objective of promoting of science and the arts, and any statutory provision purporting to create such an exclusive right must be interpreted in the light of the constitutional grant of authority on which it depends. Statutory provisions which exceed the intended scope of the patent and copyright clause will be held unconstitutional.

"The special purpose inherent in granting to authors certain limited rights in their published works was recognized by the First Congress of the United States, and it will help to illuminate the scope of the intentions of the drafters of the constitutional clause if we remember the general purpose of the legislation which was adopted in 1790. When the first copyright act under the Constitution was adopted, it was explicitly identified as 'An Act for the encouragement of learning ....' To the extent that authors received financial and other advantages from such legislation these advantages were conferred, not merely for the sake of the authors themselves, but to benefit society by encouraging learning. As Madison expressed it in explaining the copyright clause in No. 43 of The Federalist, 'The public good fully coincides ...with the claims of individuals.'

17

"What were these 'claims of individuals' which were intended to be recognized 'by securing...to Authors...the exclusive Right to their...Writings?' We have noted earlier that the Copyright Act of 1790 defined the 'exclusive right' of an author as 'the sole right and liberty of printing, reprinting, publishing and vending' his writings for a limited time. As we have pointed out, although the current copyright law uses slightly different words to express the same thought, the 'exclusive right' in an author's published writings which it recognizes is this same right to print, reprint, publish, and vend. The reference was obviously to the process of printing and reprinting editions of works for publication and sale."

The Argument of the National Library of Medicine and The National Institutes of Health

The government's brief, written by the Department of Justice, stressed the importance of the Williams & Wilkins case to the nation's medical research community. The argument attempted to place the photocopying of Williams & Wilkins journals in the perspective of the government's nationwide medical library program and to emphasize the application of "fair use" to scientific research.

Discussing the effect of photocopying on the market for scientific journals, the brief pointed out:

"In order to determine if a photocopy has had an adverse effect on the actual or potential market for a copyrighted work, it is not enough to say that the photocopy is a facsimile of the original or that the photocopy is furnished in lieu of lending the original. What must be determined is this: does the photocopy serve as a substitute for a subscription to the journal? Selling subscriptions is the major means by which plaintiff earns income from its copyrighted property. It is by this time evident that it is impossible to prove whether any given photocopy displaced a subscription sale.* Both plaintiff's Chairman of the Board and defendant's expert agreed on this point.

. . .

"...[I]f photocopying was having any adverse effect on plaintiff's operations, such effect would be reflected in the rate at which plaintiff's business and journals grew as admitted by plaintiff's Chairman of the Board. Now, it is immediately evident that if plaintiff's journals were steadily

*As to the medical personnel who obtained the photocopies of the articles involved herein, it is clear that photocopying does not take the place of journal subscriptions. Each of them subscribes to several journals; some to five or six journals (though not necessarily the same journal as those from which the photocopies were taken). Moreover, both NIH and NLM, which which subscribe to at least two copies of the journals involved herein, have found from experience that as photocopying increases, subscriptions also increase.

losing subscriptions and plaintiff's business was steadily declining during the ten year period when photocopying grew from zero to its present size, one could claim with considerable justification that photocopying was the culprit. However, the facts in this case are otherwise. Plaintiff's journals and business as a whole are admittedly doing rather well. The important factor is not that they are doing well, but how well they are, in fact, doing. For every indicator where a comparison was possible, plaintiff's business is found to be growing faster than the gross national product. Plaintiff's Chairman of the Board conceded that plaintiff's business should grow at a rate equal to the rate of growth of manpower working in the field of science. The only evidence of record of that rate of growth is that it is about 4%. The rate of growth of the gross national product, as shown on the charts prepared by defendant's expert, is greater than 4%. Thus, over the period in which plaintiff's business should have shown an increasing adverse effect from photocopying, plaintiff's business was growing at a rate greater than that which can be expected. In view of this fact, plaintiff cannot claim that photocopying is causing it to lose sales of subscriptions, sales of back volumes, and sales of reprints.

"In its brief, plaintiff raises the belated claim that photocopying is causing it to lose royalties from licenses. The evidence concerning these licenses is very meager. There is no evidence to show the purpose for which the photocopies permitted under these licenses are being made, and there is no evidence to show that these licenses are for single copies of single articles as opposed to multiple copies of single articles. Moreover, it is clear that neither of the licenses referred to were in effect at the time this suit was filed or are even now in effect. It is highly significant that none of these licenses were offered in evidence during the trial of this case.

"In an article entitled 'Why We Sue the Government,' written in April 1968, plaintiff's Chairman of the Board made the following statement:

> We only wish in some manner to be paid a royalty on each copy made to offset the loss in the sale of subscriptions, reprints and back volumes which photocopying brings about.

"During the trial of this case, plaintiff's Chairman of the Board was asked about this statement and the following colloquy took place:

> Q. Was that statement true when you made it?
> A. I thought it was.
> Q. Is it true today?
> A. I think it is.
> Q. Do you want anything more?
> A. No.

"Defendant submits that plaintiff should be taken at its word. Since the present record is devoid of any evidence showing that photocopying by the Government has caused plaintiff to lose subscription sales, reprint sales, or back volume sales, plaintiff is not entitled to recover any compensation in this lawsuit."

THE REPORT OF THE COMMISSIONER IN FAVOR OF THE PUBLISHER

On February 16, 1972, Commissioner James F. Davis issued a strongly worded opinion brushing aside the library arguments as technicalities and accepting the point of view of the publisher. Holding "that defendant has infringed plaintiff's copyrights and that plaintiff is entitled to recover 'reasonable and entire compensation'," the trial judge went on to suggest that "by using modern management practices including computers and the like, it would appear that NLM and the NIH library can, with minimum disruption, cope with the necessary recordkeeping" to pay per-page royalties on interlibrary loans.

The 63-page opinion discussed, among other things:

DEFINITION OF COPYING

"Defendant contends that its acts of copying do not violate the copyright owner's exclusive right 'to copy' the copyrighted work as provided by 17 U.S.C. § 1. The argument is that with respect to books and periodicals, the act of making single copies (i.e., one copy at a time) is not, in itself, sufficient to incur liability; that the 'copying,' to be actionable, must include 'printing' (or 'reprinting') and 'publishing' of *multiple* copies of the copyrighted work. The argument is bottomed on analysis of the copyright laws as they have evolved from 1790 to the present. The early laws distinguished 'copying' from 'printing,' 'reprinting,' and 'publishing,' and provided that the copyright in books is infringed by 'printing,' 'reprinting' and 'publishing' while the copyright in other works (e.g., photographs, paintings, drawings, etc.) is infringed by 'copying.' The 1909 Copyright Act obliterated any such distinction. It provides in § 5 a list of all classes of copyrightable subject matter (including books and periodicals), and says in § 1 that the owner of copyright shall have the exclusive right 'to print, reprint, publish, copy and vend *the copyrighted work*' [emphasis supplied]. Thus, the 1909 Act, unlike the earlier statutes, does not expressly say which of the proscribed acts of § 1 apply to which classes of copyrightable subject matter of § 5. Defendant says that to be consistent with the intent and purpose of earlier statutes, the 'copying' proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of 'printing,' 'reprinting' and 'publishing' should apply to books and periodicals.

"Defendant's argument is not persuasive and, in any event, is irrelevant. It is clear from a study of all the copyright statutes from 1790 to date that what Congress has sought to do in every statute is to proscribe unauthorized *duplication* of copyrighted works. The words used in the various statutes to define infringing acts (i.e., printing, reprinting, copying, etc.) were simply attempts to define the then-current means by which duplication could be effected. It is reasonable to infer that in 1909, when Congress included 'copying' in the list of proscribed acts applicable to books and periodicals (as well as copyrightable subject matter in general), it did so in light of the fact that new technologies (e.g., photography) made it possible to duplicate books and periodicals by means other than 'printing' and 'reprinting.' The legislative history of the 1909 Act says little, one way or the

other, about the matter.

. . .

COPYING VERSUS PUBLISHING

"Furthermore, defendant's argument that it may 'copy,' short of 'printing,' 'reprinting' and 'publishing,' is irrelevant under the facts of this case. NLM and the NIH library did not merely 'copy' the articles in suit; they, in effect, 'reprinted' and 'published' them. 'Printing' and 'reprinting' connote making a duplicate original, whether by printing press or a more modern method of duplication. 'Publishing' means disseminating to others, which defendant's libraries clearly did when they distributed photocopies to requesters and users.

"Defendant's contention that its libraries make only 'single copies' of journal articles, rather than multiple copies, is illusory and unrealistic. Admittedly, the libraries, as a general rule, make only per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. E.g., the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called 'single copying' practice on plaintiff's legitimate interests as copyright owner are obvious. The Sophar and Heilprin report, at 16, puts in terms of a colorful analogy: 'Babies are still born one at a time, but the world is rapidly being overpopulated.'

"Finally, and in any event, there is nothing in the copyright statute or the case law to distinguish, in principle, the making of a single copy of a copyrighted work from the making of multiple copies. The first copyright statute (Act of 1790) provided in § 2 that it was infringement to make 'any *copy* or *copies*' [emphasis supplied] of a copyrighted work. Nothing in the later statutes or their legislative histories suggests that Congress intended to change that concept. And the courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement.

. . .

FAIR USE AND MARKET VALUE

"...[I]t is not 'fair use' to copy substantial portions of a copyrighted work when the new work is a substitute for, and diminishes the potential market for, the original. And it has been held that wholesale copying of a copyrighted work is never 'fair use,' even if done to further educational

or artistic goals and without intent to make profit.

"Whatever may be the bounds of 'fair use' as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for 'fair use.' The photocopies are exact duplicates of the original articles: are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement. Moreover, damage may be inferred in this case from the fact that the photocopies are intended to supplant the original articles. While it may be difficult (if not impossible) to determine the number of subscription sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber, or at least is a potential source of royalty income for licensed copying. Plaintiff has set up a licensing program to collect royalties for photocopying articles from its journals; and among the licensees have been libraries, including a Government library. Also, there is evidence that one subscriber canceled a subscription to one of plaintiff's journals because the subscriber believed the cost of photocopying the journal had become less than the journal's annual subscription price; and another subscriber canceled a subscription, at least in part because library photocopies were available. Loss of subscription (or photocopying royalty) income is particularly acute in the medical journal field. The record shows that printing preparation costs are 50-65 percent of total cost of publication and that the number of subscriptions is relatively small. This simply means that any loss of subscription sales (or royalty income) has the effect of spreading publication costs over fewer copies, thus driving up steeply the unit cost per copy and, in turn, subscription prices. Higher subscription prices, coupled with cheap photocopying, means probable loss of subscribers, thus perpetuating a vicious cycle which can only bode ill for medical publishing.

. . .

SCHOLARLY USE

"Defendant also contends that traditionally, scholars have made handwritten copies of copyrighted works for use in research or other scholarly pursuits; that it is in the public interest that they do so because any harm to copyright owners is minimal compared to the public benefits derived therefrom; and that the photocopying here in suit is essentially a substitute for handcopying by the scholars themselves. That argument is not persuasive. In the first place, defendant conceded that its libraries photocopy substantially more material than scholars can or do copy by hand. Implicit in such concession is a recognition that laborious handcopying and rapid machine photocopying are totally different in their impact on the interests of copyright owners. Furthermore, there is no case law to support defendant's proposition that the making of a handcopy by scholars or researchers of an *entire* copyrighted work is permitted by the copyright laws.

. . .

"A ROUTINE, ALBEIT TEDIOUS, MATTER"

"Defendant suggested at trial that payment of compensation to plaintiff for photocopying its journals would create a continuing undue and oppressive administrative and financial burden on NLM and the NIH library. Defendant has not pressed the point in its brief, perhaps because it is clear that plaintiff's right to compensation under 28 U.S.C. § 1498(b) cannot depend on the burdens of compliance. Nevertheless, defendant's point merits comment since courts should be mindful of the practical consequences of their decisions. Based on this record, defendant's fears are not justified. Both NLM and the NIH library already have administrative procedures by which they keep detailed records of photocopying. Both libraries require that written request slips be submitted by requesters of photocopies. The slips are a permanent record of the journals and pages photocopied. It would seem a routine, albeit tedious, matter to cull from those records the information necessary to calculate a reasonable royalty on the basis of the number of articles copied, or perhaps to come up with an acceptable formula for establishing a blanket annual royalty payment."

THE REACTION OF THE LIBRARY COMMUNITY: ALA REPLIES

The report of Commissioner Davis came as a blow to the library community which had been anxiously awaiting the outcome of the litigation. The Commissioner's report brought forth a blast from ALA's attorney William D. North, who summoned "the support of every library, librarian, trustee, educator, scholar, researcher and every other person concerned with the intellectual welfare of this country to make sure that the recommendations of the Commissioner never become the law of the land."

In an article appearing in the May 1972 issue of American Libraries North termed the decision "the great leap backward."

North said, in part:

"By his Report, the Commissioner has placed in legal jeopardy the use of photocopies in lieu of interlibrary loans or original works by every public, academic and research library in this country. He has, moreover, raised grave questions concerning the right of libraries to convert works in their collections to microform and to retrieve such works in 'hard copy.'

"While the Report will have great impact on library operations, its primary effect is on the ability of the scientific and educational community to gain access to the intellectual resources of this country.

"The thrust of the Report is that any library that makes a photocopy of a copyrighted work in its collection for any scientific or scholarly purposes is guilty of infringement unless it first secures the position of the copyright proprietor. Failure to secure such permission would expose the library to minimum statutory damages of $250.00 (17 U.S.C. Sec. 101) as

well as costs and attorneys' fees (17 U.S.C. Sec. 116) for each infringement.

. . .

"We believe that the effect of the Commissioner's recommended conclusion of law would be to slow and discourage scientific and scholarly research, contrary to the national interest.

"The rapid expansion of educational opportunities since World War II has imposed unprecedented demands on the library resources of this country. Larger numbers of college and graduate students, expanded programs of scientific and scholarly research and the generally higher educational level of the people have significantly increased the need for fuller utilization of the scholarly, scientific, and technical information available. At the same time, the publication explosion has made it impossible for any individual library to have in its collection all or even a major portion of the works that are required. Financial and physical limitations have compelled a sharing of library resources. As a consequence, interlibrary loan has become increasingly essential to scholars. Interlibrary loan enables the library resources of the nation to be maximized.

"But for interlibrary loan, access to research materials would be limited to those persons fortunate enough to be able to travel wherever their research requirements take them. Scholars outside of the major centers of learning would be deprived of the essential tools of scholarship.

"Interlibrary loan, to be sure, is greatly expedited by means of photocopies, and a substantial number of interlibrary loan requests are satisfied in this manner. In part this procedure enables the library to protect its collection from loss and maximize the availability of its resources. But the more fundamental reason is that no library can afford to acquire and house forever every publication its patrons may sometime need. The copyright proprietors recognize this fact in their own actions by not keeping all copyright works in print and in stock. When the demand is less than the publisher can satisfy with a profit to himself, the user's need and the public good count for naught. As far as he is concerned, the public can do without. Thus, in claiming royalties for interlibrary loan photocopies, the publisher seeks compensation for an essential service he cannot or will not render to the public and and which involves neither expense or risk of his capital.

. . .

"The Commissioner's Report suggests that the solution to the problem posed by interlibrary loan photocopying is the solution 'provided by ASCAP and BMI in the fields of music and the performing arts.' What he fails to consider is that during the last twenty-eight years (the original copyright term) over 450,000 titles have been published in the United States, most of which are copyrighted. In addition, the *Standard Periodical Directory* lists

for 1970 alone over 53,000 titles excluding suburban, weekly and small daily newspapers. Serial services constitute another substantial number of copyrighted works.

"It is, of course, impossible for each library to negotiate licenses with each of the owners of copyrighted works in its collection. Nor is it practical, even if conceivably possible, for the library to secure permission to copy whenever a request is received. Not only would the delays be prohibitive but the cost to the library or the scholar of finding the copyright owner and consummating the transaction would be staggering.

"The copyright owners themselves have not shown any inclination to organize themselves into an ASCAP or BMI arrangement. Even if licensing arrangements could be accomplished, however, the cost to the publishers of maintaining records to assure correct royalty payments to each author for a few photocopies would surely cost him more than his return. The only benefit to the publisher would be if he did not have to pass the royalties on to the authors. But the guarantee of more money to publishers is not the purpose of the Constitutional provision or the Copyright Act. The encouragement specified is to authors, not to publishers."

Ralph Shaw Speaks Out

As lawyers for the National Library of Medicine and the library associations girded their loins for the second battle with the publishers, this time before the full seven-judge panel of the Court of Claims, Ralph Shaw penned his acid analysis, a professional librarian's rebuttal, of the Commissioner's decision.

Of all members of the profession, Shaw was eminently qualified to speak his mind. A former director of the National Agricultural Library, his experience with journal photocopying problems predated NLM's by a decade. As operator of the Scarecrow Press he had learned the publisher's point of view first hand. And as a doctoral student at the University of Chicago he had written his dissertation on "Literary Property in the United States."

Shaw's analysis of Williams & Wilkins appeared in the September 1972 issue of American Libraries, a month before he died. The gist of his argument -- that photocopying was an essential element in modern scholarship, that the publisher's economic arguments were base and groundless, that royalty schemes were monstrous, and that, in fact, copyright law had no justifiable application in private, non-commercial photocopying -- is contained in the following excerpts:

"The case of Williams & Wilkins v. The United States is of great importance to scholars, libraries and to the advancement of learning and of knowledge in the United States. It ranges far beyond the case as originally brought -- involving not only the copyright law -- but introduces erroneous arguments by analogy from the patent law. It also questions the right of scholars to make notes or copies for their own

study and private use, regardless of the means used, as well as the right of libraries to act as agent for the scholar in making single copies for his own private use and at his specific request. It brings up questions of the alleged parlous state of medical publishing, and repeatedly brings up the alleged danger of government control, and many other topics....

"The case actually before the Court was simply the plaintiff's allegation that NIH and NLM has infringed the plaintiff's copyright in the four named journals [Medicine, Journal of Immunology, Gastroenterology, and Pharmacological Reviews] by photocopying eight specified articles from five volumes of these journals, and to obtain compensation therefor.

"The case has been broadened in the testimony and in the Commissioner's Report far beyond these bounds and includes quotations from selected articles and textbooks on a wide range of subjects: the total copying done by NIH and NLM from all sources, many of which may be in the public domain; the double-headed argument a) that since medical journals are alleged to be of low circulation and little advertisement income is received, photocopying (in general) may cause them to lose subscriptions (with no evidence offered) so that some or all of them may have to go out of business; repeatedly raising the bogey man that this would result in government take-over and control (all without evidence); while b) on the other hand the plaintiff itself asserts that photocopying is essential and the plaintiff does not want to interfere with it in any way -- they just want to get paid for any photocopying from their journals.

. . .

THE PRIVATE USE OF SCHOLARS

"Copyright law (hereinafter referred to as 17 U.S.C. Sections 1 et.seq.) deals with general publication, not private use, or the author's common law right to make extensive limited or restricted publication. No cases have been found on any aspect of statutory copyright that were not brought on the grounds of alleged general public use, i.e. general publication, and copyright can not even be obtained without a general publication. Private use of materials for one's own study, regardless of the form in which the material is used, is completely outside the scope of 17 USC, which deals with public uses only, and private use achieves the purpose for which the Constitution authorized the Congress to pass a Copyright Law.... There is a difference between making a copy for one's own use or importing one copy for one's own use and making one or more copies for public use (i.e. general publication), and nothing in the statute limits private uses, or the methods by which they are made. Private use is completely outside the scope of the statute limiting public uses. What a man can do for himself he can do through an agent, so the fact that he has the library do it for him does not change its status, he could borrow the journal and photocopy it on any of the ubiquitous copying machines, doing it himself or having his secretary or any other agent do it for him. If he then makes a public use of the material (i.e. a general publication), then the question of fair use versus infringement comes up, but that is not changed by whether he made the copy by hand or by machines, nor is it changed by whether he did it

himself or had an agent do it for him, or whether he used the original publication.

. . .

REASONABLE ROYALTY

"Throughout the report the Commissioner uses polar terms such as 'wholesale copying,' and 'reasonable royalty' without defining the terms. Certainly with the total of Williams & Wilkins journals making up only about two-thirds of one percent of the total number of medical journals currently published, the total photocopying of NIH and NLM represents an almost microscopic percentage of the articles appearing in all the volumes of all the different journals from which they photocopied less than 210,000 articles in the whole year, according to the Commissioner's report. Considering the number of volumes of all the 6,000 different journals (each containing many articles) from which they photocopied would make the percentage of material copied, on the average, from any one volume of any one journal, a tiny Sub Minibus... rather than wholesale in any sense of that term.

"The 'reasonable royalty' referred to repeatedly in the Commissioner's report, insofar as NLM is concerned, is 2 cents per page and with respect to other licensees is 5 cents per page. However, a letter from Mr. Alan Latman, attorney of record for the plaintiff to the Assistant Attorney General, dated February 25, 1972, spells out a proposed licensing agreement for the two libraries with a fee of 5 cents per page applied (at the option of the libraries) based on

a) 5¢ multiplied by the number of text pages scheduled for production for the particular journal [even if none is ever photocopied], or ...

b) 5¢ multiplied by the number of pages in the journal actually photocopied by the libraries, [which would a tremendous amount of bookkeeping for the thousands of journals involved], or ...

c) 5¢ multiplied by the number of pages which the parties agree represents the approximate number of pages photocopied by the libraries without actual counting of pages [which could mean anything].

"The Commissioner gives no basis for repeatedly calling the licensing fee 'reasonable' whether the 2¢ in the Report or the 5¢ per page, or vastly more, depending on the option selected, proposed in the letter. This is particularly peculiar considering that there are serious questions as to the validity of the copyrights in several of the journals at issue as well as in many of the articles.

"As a member of the American Book Publisher's Council for a number of years, having listened to or partaken in a large number of discussions with major publishers on possible application of the type of agreement involved in ASCAP or BMI or other schemes, this author can attest that in no case did anyone come up with a scheme that made any sense and would cost less than the amount of royalty that might be expected....

27

"As a practical matter, there would no way of policing copying for private use, and the issue here is copying for private use, not copying for general publication.

"Scholars may have access to copyrighted materials in many ways. They generally buy a few and use them in the privacy of their homes or studies; they borrow some from libraries and from colleagues, and they obtain access to them in many lawful ways. Their note taking, or copying for them, may be done by themselves or their secretaries, and there are few buildings around any campus or research establishment that do not provide ready access to copying machines.

"Policing all these sources and methods of making copies for the pennies involved in each case (and with a very large percentage of what they copy probably in the public domain) is too ridiculous to contemplate and even a Big-Brother-Society would find this somewhat of a problem.

COMPREHENSIVE DUPLICATION SYSTEMS

"The Commissioner says that the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles... and in essence these systems 'are a reprint service which supplants the need of journal subscriptions.'

"The use of the term reprint service, applied to editions of one copy is incomprehensible. No one can do reprinting in editions of one and stay solvent. And there are no facts to justify this statement. The Commissioner's statement goes far beyond the number of pages of the articles in suit that were photocopied. Using a low estimate of the text pages of volume 38 of Medicine, which has not been examined, but using the actual number of text pages of the other four volumes in suit, and multiplying each by the number of subscriptions for each journal, the plaintiff produced and sold well over 30 million pages of text of the five volumes in suit, as compared with something less than 3 million pages of articles produced by NIH and NLM from the long files of many volumes of thousands of different journals during the year.

"But getting back to the items in suit, there is the statement by the Commissioner that this '...supplants the need for journal subscriptions.' Every one of the four journals actually in suit has increased in circulation over the last five to ten years, and there is no evidence that they have lost potential subscribers because of the copying of articles cited from these journals that were photocopied by NIH and NLM.

"More specifically, and using the figures given in the Commissioner's report for the articles in suit and the journals in suit, his report shows a total of 13 copies of articles Count I-VIII made by the two libraries from September 27th, 1967 to January 12th, 1968, a total of 108 days. Translated to an annual base, this would give 40 photocopies made of these eight articles in a year, and adding 25% as a safety factor would make this a maximum of 50 photocopies made by the two libraries of the eight articles over the year.

The copies made by NIH were for staff at NIH and those made by NLM were for the country as a whole. However, even if we were to assume that they were all made for the professional personnel of NIH alone, which according to the report is 4,000 people, remembering that there are five volumes involved, and the Plaintiff sells volumes not articles, we would have a total of 10 articles per year copied for four thousand people. Dividing the 10 by 4000 to get the average number of articles copied per scientist per year (of the articles in suit) we come up with a figure of 25/10,000ths of an article from each volume per year per scientist.

"This means that, on the average, the scientists at NIH would have to subscribe to each of the journals for about 400 years in order to get the one article he might find useful in each of the articles in suit, and that would be a good trick if he could do it, though a mighty unlikely one, and most uneconomical.

"If this does not fit the definition of De Minimis non Curat Lex, what could? And what evidence does the Commissioner have to support his flat statement that the copying of the journals and articles at issue in this case '...supplants the need for journal subscriptions?' [Emphasis supplied]

"The Sophar and Heilprin quote 9/ about babies bring born one at a time has nothing to do with case, even though it is 'cute.' Scientific findings and other scholarly discoveries are made one at a time and the tremendous increase in research over the last 30 years or so has greatly increased knowledge in many fields. This requires more publishing, and more scientists and more need for the literature, and more subscriptions to magazines, but that has nothing to do with this particular case.

"The Commissioner says, 'Finally, and in any event, there is nothing in the copyright statute or the case law to distinguish in principle the making of a single copy of a copyrighted work from the making of multiple copies...'

"This is not true, and the Commissioner himself says '...a library, no doubt,... can supply attorneys or courts with single photocopies for use in litigation...' [Emphasis supplied].

. . .

THE LIBRARY AS AGENT

"The fundamental fact is that the Copyright Act has nothing to do with private uses of copyrighted materials by scholars. In fact, that was the purpose for which the Constitution authorized the Congress to pass a Copyright Act, giving authors and their assigns a monopoly of general public uses for limited periods. So long as the scholar's private use does not impinge upon the author's or his assigns' (proprietors') monopoly of public uses, his copy of validly copyrighted materials has nothing to do with 17 USC, which in itself and its interpretations, and in Constitutional intent, deals solely with general public uses.

"He as a right to make a copy or import a copy, etc., for his private study and use, and what he can do for himself he can do through an agent. The library, making a copy, by any means, at the specific request of a scholar, of an article for his private study and use, is simply acting as his agent to do for him, at his specific request, and for his private use, what the scholar has every right to do for himself. The method of copying has nothing to do with this, and the Copyright Law has nothing to say about this. It is completely outside the scope of 17 USC.

"If, later, the scholar makes a general public use of the material, then the statute and its interpretations apply, regardless of whether the source from which he made the use was the original or a copy prepared by any means."

THE DECISION OF THE FULL COURT OF CLAIMS IN FAVOR OF THE LIBRARIES

The opinion of the full seven-judge panel substantially reversed the findings of the Commissioner. "We conclude," said Judge Oscar H. Davis in the November 27, 1973, opinion, "that plaintiff has failed to show that the defendant's use of the copyrighted material has been 'unfair,' and conversely we find that these practices have up to now been 'fair.' There has been no infringement."

On the other hand, the decision was hardly a sweeping victory for libraries. The verdict applied only to the peculiar circumstances of NIH and NLM and the medical research community. Stressing the narrowness of the decision, Judge Davis urged Congress to update the law and take modern technology into consideration.

The decision did, however, adopt a different approach to many of the questions considered by the Commissioner in the earlier opinion. Among the points covered in the decision were:

COPYING AND PUBLISHING

"Section 1 of the [Copyright] Act, 17 U.S.C. § 1, declares that the copyright owner 'shall have the exclusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work; ***' Read with blinders, this language might seem on its surface to be all-comprehensive-especially the term 'copy'-but we are convinced, for several reasons, that 'copy' is not to be taken in its full literal sweep....

"Defendant and some of the amici say that, to be consistent with the intent and purpose of earlier statutes, the 'copying' proscription of § 1 should not apply to books or periodicals; rather, only the proscribed acts of 'printing,' 'reprinting' and 'publishing' control books and periodicals. The proponents of this view stress that the legislative history of the 1909 legislation does not suggest any purpose to alter the previous coverage.

"This is quite a serious argument. However, in view of Congress' general inclusion of the word 'copy' in Section 1 and of the practice under the Act since 1909, we are not ready to accept fully this claim that infringement of periodical articles can come only through 'printing,' 'reprinting' or 'publishing.' But we do believe this point-that there is a solid doubt whether and how far 'copy' applies to books and journals-must be taken into account in measuring the outlines of 'copying' as it involves books and articles.

LIBRARY OF CONGRESS AND COPYING

"Adding to this doubt that 'copy' blankets such printed matter is the significant implication of a special segment of the background of the 1909 statute, a sector of history which is peripheral but revealing. The then Librarian of Congress, Herbert Putnam, was the leading public sponsor of that Act (outside of Congress itself), and was intimately involved in its preparation from at least 1906 on. While the bill was being considered in Congress, the Library's 1908 'Rules and Practice Governing the Use and Issue of Books,' p. 6, specifically provided:

> '*Photographing.* Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. *It extends to articles bearing claim of copyright,* but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright' (emphasis added).

After the 1909 Act became law, the Library continued the same provision. The 1913 version of the 'Rules and Practice' added the following on 'Photostat,' after the above paragraph on 'Photographing':

> Photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief for a schedule of charges.

Later editions, throughout Dr. Putnam's tenure (which ended in 1939), contained the same or comparable provisions. Indeed, when he left his post in 1939, he was honored by the American Council of Learned Societies because (among other things) 'You have led in adapting the most modern photographic processes to the needs of the scholar, and have *** made widely available for purposes of research copies of your collections ***.' This illuminating slice of history, covering the time of enactment and the first three decades of the 1909 Act, should not be ignored.

"These are the leading reasons why we cannot stop with the dictionary or 'normal' definition of 'copy' -nor can we extract much affirmative help from the surfacial legislative text. As for the other rights given in Section 1, 'vend' is clearly irrelevant (since NIH and NLM do not sell), and

the applicability to this case of 'print,' and 'publish' is more dubious than of 'copy.' The photocopy process of NIH and NLM, described in Part I, *supra*, does not even amount to printing or reprinting in the strict dictionary sense; and if the words be used more broadly to include all mechanical reproduction of a number of copies, they would still not cover the making of a single copy for an individual requester. If the requester himself made a photocopy of the article for his own use on a machine made available by the library, he might conceivably be 'copying' but he would not be 'printing' or 'reprinting.' The library is in the same position when responding to the demands of individual researchers acting separately.

"For similar reasons there is no 'publication' by the library, a concept which invokes general distribution, or at least a supplying of the material to a fairly large group. The author of an uncopyrighted manuscript does not lose his common law rights, via publication, by giving photocopies to his friends for comment or their personal use-and publication for Section 1 purposes would seem to have about the same coverage. In any event, the hitherto uncodified principles of 'fair use' apply to printing, reprinting, and publishing, as well as to copying, and therefore the collocation of general words Congress chose for Section 1 is necessarily inadequate, by itself, to decide this case.

FAIR USE AND PUBLIC BENEFIT

"In the fifty-odd years since the 1909 Act, the major tool for probing what physical copying amounts to unlawful 'copying' (as well as what is unlawful 'printing,' 'reprinting' and 'publishing') has been the gloss of 'fair use' which the courts have put upon the words of the statute. Precisely because a determination that a use is 'fair,' or 'unfair,' depends on an evaluation of the complex of individual and varying factors bearing upon the particular use (see H.R. Rep. No. 83, 90th Cong., 1st Sess., p.29), there has been no exact or detailed definition of the doctrine. The courts, congressional committees, and scholars have had to be content with a general listing of the main considerations-together with the example of specific instances ruled 'fair' or 'unfair.' These overall factors are now said to be: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d)the effect of the use on a copyright owner's potential market for and value of his work.

"In addition, the development of 'fair use' has been influenced by some tension between the direct aim of the copyright privilege to grant the owner a right from which he can reap financial benefit and the more fundamental purpose of the protection 'To promote the Progress of Science and the useful Arts.' U.S. Const., art. 1, § 8. The House committee which recommended the 1909 Act said that copyright was '[n]ot primarily for the benefit of the author, but primarily for the benefit of the public.' H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 7. The Supreme Court has stated that 'The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.' *Mazer* v *Stein*, 347 U.S. 201, 219 (1954); *United States* v.*Paramount Pictures*, 334 U.S. 131, 158 (1948). *See* Breyer, *The Uneasy Case for Copyright: A study of Copyright in Books, Photocopies,*

and Computer Programs, 84 Harv. L. Rev. 281 (1970). To serve the constitutional purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' *Berlin* v. *E.C. Publications, Inc.*, 329 F. 2d 541, (2d Cir. 1964). Whether the privilege may justifiably be applied to particular materials turns initially on the nature of the materials, e.g., whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography.' *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 307 (C.A. 2, 1966).

"It has sometimes been suggested that the copying of an entire copyrighted work, any such work, cannot ever be 'fair use,' but this is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice. The handwritten or typed copy of an article, for personal use, is one illustration, let alone the thousands of copies of poems, songs, or such items which have long been made by individuals, and sometimes given to lovers and others. Trial Judge James F. Davis, who considered the use now in dispute not to be 'fair,' nevertheless agreed that a library could supply single photocopies of entire copyrighted works to attorneys or courts for use in litigation. It is, of course, common for courts to be given photocopies of recent decisions, with the publishing company's headnotes and arrangement, and sometimes its annotations. There are other examples from everyday legal and personal life. We cannot believe, for instance, that a judge who makes and gives to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both judges are then considering in a case before them is infringing the copyright, rather than making 'fair use' of his issue of that journal. Similarly with the photocopies of particular newspaper items and articles which are frequently given or sent by one friend to another. There is, in short, no inflexible rule excluding an entire copyrighted work from the area of 'fair use.' Instead, the extent of the copying is one important factor, but only one, to be taken into account, along with several others.

. . .

VOLUME OF PHOTOCOPIES

"We start by emphasizing that (a) NIH and NLM are non-profit institutions, devoted solely to the advancement and dissemination of medical knowledge which they seek to further by the challenged practices, and are not attempting to profit or gain financially by the photocopying; (b) the medical researchers who have asked these libraries for the photocopies are in this particular case (and ordinarily) scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to reduplicate them for sale or other general distribution; and (c) the copied articles are scientific studies useful to the

requesters in their work. On both sides-library and requester-scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research. This is important because it is settled that, in general, the law gives copying for scientific purposes a wide scope....

"Both libraries have declared and enforced reasonably strict limitations which, to our mind, keep the duplication within appropriate confines. The details are set forth in Part I *supra*, and in our findings. Both institutions normally restrict copying on an individual request to a single copy of a single article of a journal issue, and to articles of less than 50 pages. Though exceptions are made, they do not appear to be excessive, unwarranted, or irrational. For instance, though on occasion one person was shown to have ordered or received more than one photocopy of the same article, the second copy was for a colleague's use or to replace an illegible or undelivered copy. Some care is also taken not to have excessive copying from one issue or one volume of the periodical. While a certain amount of duplication of articles does, of course, occur, it does not appear to be at all heavy. There is no showing whatever that the recipients use the libraries' photocopying process to sell the copies or distribute them broadly.

"NIH responds only to requests from its own personnel, so that its entire photoduplication system is strictly 'in-house'--in the same way that a court's library may supply a judge of that court with a copy of a law journal article or a reported decision. NLM fulfills requests more generally but it has adopted the practice of not responding (outside of the Government) where the article appears in a recent (preceding 5 years) issue of a periodical on its 'widely-available list.' The result is that the duplication of recent issues of generally available journals is kept within the Government, and distribution to the larger medical public is limited to older, less available issues and to journals which are harder to obtain from medical libraries. It is a fair inference, supported by this record, that at the very least in the latter classes the demand has been inadequately filled by reprints and the publisher's sale of back issues. *See, also*, Part III, 4, *infra*. In those instances not covered by 'five year' policy, the impression left by the record is that, on the whole, older rather than current articles were usually requested.

"[P]laintiff points to the very large number, in absolute terms, of the copies made each year by the two libraries. We do not think this decisive. In view of the large numbers of scientific personnel served and the great size of the libraries-NIH has over 100,000 volumes of journal materials alone, and NLM is currently binding over 18,000 journals each year-the amount of copying does not seem to us to have been excessive or disproportionate. The important factor is not the absolute amount, but the twin elements of (i) the existence and purpose of the system of limitations imposed and enforced, and (ii) the effectiveness of that system to confine the duplication for the personal use of scientific personnel who need the material for their work, with the minimum of potential abuse or harm to the copyright owner. The practices of NIH and NLM, as shown by the

record, pass both of these tests, despite the large number of copies annually sent out.

. . .

SCHOLARLY USE AND POTENTIAL SALES

"The fact that photocopying by libraries of entire articles was done with hardly any (and at most very minor) complaint, until about 10 or 15 years ago, goes a long way to show both that photoduplication cannot be designated as infringement *per se*, and that there was at least a time when photocopying, as then carried on, was 'fair use.' ...

"There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped. We do not spend time and space demonstrating this proposition. It is admitted by plaintiff and conceded on all sides. ... The supply of reprints and back numbers is wholly inadequate; the evidence shows the unlikelihood of obtaining such substitutes for photocopies from publishers of medical journals or authors of journal articles, especially for articles over three years old. It is, moreover, wholly unrealistic to expect scientific personnel to subscribe regularly to large numbers of journals which would only occasionally contain articles of interest to them. Nor will libraries purchase extensive numbers of whole subscriptions to all medical journals on the chance that an indeterminate number of articles in an indeterminate number of issues will be requested at indeterminate times. The result of a flat proscription on library photocopying would be, we feel sure, that medical and scientific personnel would simply do without, and have to do without, many of the articles they now desire, need, and use in their work.

"Plaintiff insists that it has been financially hurt by the photocopying practices of NLM and NIH, and of other libraries. The trial judge thought that it was reasonable to infer that the extensive photocopying has resulted in some loss of revenue to plaintiff and that plaintiff has lost, or failed to get, 'some undetermined and indeterminable number of journal subscriptions (perhaps small)' by virtue of the photocopying. He thought that the persons requesting photocopies constituted plaintiff's market and that each photocopy user is a potential subscriber 'or at least a potential source of royalty income for licenses copying.'

"The record made in this case does not sustain that assumption. Defendant made a thorough effort to try to ascertain, so far as possible, the effect of photoduplication on plaintiff's business, including the presentation of an expert witness. The unrefuted evidence shows that (a) between 1958 and 1969 annual subscriptions to the four medical journals involved increased substantially (for three of them, very much so), annual subscription sales likewise increased substantially, and total annual income also grew; (b) between 1959 and 1966, plaintiff's annual taxable income increased from $272,000 to $726,000, fell to $589,000 in 1967, and in 1968 to $451,000; (c) but the four journals in suit account for a relatively small percentage of plaintiff's total business and over the years each has been profitable.... One need not enter the semantic

over whether the photocopy supplants the original article itself or is merely in substitution for the library's loan of the original issue to recognize, as we have already pointed out, that there other possibilities. If photocopying were forbidden, the researchers, instead of subscribing to more journals or trying to obtain or buy back-issues or reprints (usually unavailable), might expend extra time in note-taking or waiting their turn for the library's copies of the original issues-or they might very well cut down their reading and do without much of the information they not get through NLM's and NIH's copying system.

"The record shows that each of the individual requesters in this case already subscribed, personally, to a number of medical journals, and it is very questionable how many more, if any, they would add. The great problems with reprints and back-issues have already been noted. In the absence of photocopying, the financial, time-wasting, and other difficulties of obtaining the material could well lead, if human experience is a guide, to a simple but drastic reduction in the use of the many articles (now sought and read) which are not absolutely crucial to the individual's work but are merely stimulating or helpful. The probable effect on scientific progress goes without saying, but for this part of our discussion the significant element is that plaintiff, as publisher and copyright owner, would not be better off. Plaintiff would merely be the dog in the manger.

. . .

PREEMINENTLY A PROBLEM FOR CONGRESS

"Plaintiff's answer is that it is willing to license the libraries, on payment of a reasonable royalty, to continue photocopying as they have. Our difficulty with that response-in addition to the absence of proof that plaintiff has yet been hurt, and the twin doubts whether plaintiff has a viable license system and whether any satisfactory program can be created without legislation-is that the 1909 Act does not provide for compulsory licensing in this field. All that a court can do is to determine the photocopying an infringement, leaving it to the owner to decide whether to license or to prohibit the practice....

"[If] photocopying of this type is an infringement the owners are free under the law to seek to enjoin any and all nongovernmental libraries. A licensing system would be purely voluntary with the copyright proprietor. We consider it entirely beyond judicial power, under the 1909 Act, to order an owner to institute such a system if he does not wish to. We think it equally outside a court's present competence to turn the determination of 'fair use' on the owner's willingness to license-to hold that photocopying (without royalty payments) is not 'fair use' if the owner is willing to license at reasonable rates but becomes a 'fair use' if the owner is adamant and refuses all permission (or seeks to charge excessive fees).

"The truth is that this is now preeminently a problem for Congress: to decide the extent photocopying should be allowed, the questions of a compulsory license and the payments (if any) to the copyright owners, the system for collecting those payments (lump-sum, clearinghouse, etc.), the special status (if any) of scientific and educational needs. Obviously there is much to be said on all sides. The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion....

CONGRESS AND COPYRIGHT

"I am just puzzled and perplexed and I guess confused like most everybody in trying to resolve this problem. I think I have a full measure of sympathy for all interests; I mean, I would like to see the publisher and author and so forth compensated, and at the same time I don't see how ..."

--Senator John L. McClellan
Chairman of the Senate
Subcommittee on Patents,
Trademarks and Copyright

during a hearing on library
photocopying - July 31, 1973

The crucial problem with any copyright legislation is that, whoever is helped, someone else is hurt. If the new copyright bill gives royalty payments to rock singers for pop records played over the radio, then disc jockey shows have to charge more to advertisers. If the bill makes cable television promoters pay royalties for network TV programs they retransmit, then monthly charges go up for thousands of CATV subscribers.

Any legislator making a decision on copyright is bound to incur someone's wrath. It took four years to hammer out the provisions of the 1909 Act, which had to deal for the first time with such modern contraptions as player piano rolls and phonograph discs. The bill was finally passed by Congress on the final day of Theodore Roosevelt's term in office and the President signed the bill into law as he stood in the Capitol rotunda waiting for Taft's inauguration to begin.10/

Although occasionally amended in the succeeding years, the existing law is virtually the same as the 1909 legislation. For the past ten years Congress has made different attempts at writing a revised statute, but with little success.

The problem is that traditional copyright law often conflicts with evolving technology. Thus, for instance, a law curbing the use of copy-

righted works as input for computer experiments severely limits the potential development of machine-readable literature though it protects the age-old rights of authors. The testimony before Sen. John McClellan's Subcommittee on Patents, Trademarks and Copyrights 11/ is rife with such examples, each one describing the complaint of some allegedly injured party. Therefore Congress, aware that whatever they do with copyright will enrage someone, approaches any measure with a certain amount of loathing.

Complete agreement on any new legislation will be almost impossible to obtain. The knottiest problem at the moment is cable television, but there are numerous other battlegrounds as well. Some of the trouble spots, beginning with the CATV issue, are listed here:

CABLE TELEVISION

In spite of two Supreme Court decisions and a 1971 "consensus agreement" imposed by the White House, a fierce wrangle continues between broadcasters, cable TV operators and the motion picture industry over whether CATV operators should pay royalties for retransmitting commercial television programs.

The essence of the decisions of the high court in the Fortnightly (1968) and Teleprompter (1974) cases was that CATV was not in itself a performer of a copyrighted work and thus was not liable to royalty payments. However, in writing the majority opinion in the Teleprompter case Justice Potter Stewart stressed that the courts were ill equipped to deal with modern technology when forced to rely on the 65-year-old copyright law. "Any ultimate resolution of the many sensitive and important problems in this field must be left to Congress," he wrote. 12/

Meanwhile, the White House and Federal Communications Commission had obtained agreements in 1971 between the opposing parties which allowed CATV to import two signals in return for everyone's support of new copyright legislation. Sen. McClellan interpreted the agreement as White House interference in legislative matters, however, and the battle continued. After a long day of hearings in the summer of 1973 the Senator finally told Jack Valenti of the Motion Picture Association of America, "Personally, I would like for the problem to go away. Apparently it is not going to go away. We are going to have to approach it and get some solution to it..."13/

But the solution does not seem close at hand. The motion picture industry has softened its position somewhat following the loss of the Teleprompter case in the spring of 1974, but the lobbying continues. In addition CATV is battling with broadcasters and professional sports interests over the right to retransmit athletic events into markets blacked out to conventional broadcasters by existing FCC rules.

The current copyright revision bill (S. 1361) provides that CATV operators will pay royalties calculated on a percentage of gross receipts and the money will be distributed through the office of the Register of Copyrights.

Obviously, the CATV industry is unhappy with this provision and it has powerful backers on the Hill.

PERFORMERS' RIGHTS

In another area, the bill stipulates that broadcasters will be required to make a royalty payment to performers holding copyrights on recordings played over the air. Currently, a royalty is paid to composers through performing rights societies, but not to performers.

Naturally, broadcasters are unhappy with this added expense.

LENGTH OF COPYRIGHT

Within the education/library field there are also a number of problems in addition to the obvious one of library photocopying.

Traditionally, educators have objected to the bill's extending copyright protection for the life of the author plus 50 years because they feel this is an unnecessarily long term to keep the work out of the public domain and benefits primarily the publishing industry. Not surprisingly, the publishers feel this is a key element in the bill. Current protection is for 28 years with the right of extending it for a second 28 years at which time it expires.

COMPUTERS

Computer experts feel a provision requiring the payment of copyright fees to publishers at the time material is placed in a computer (as opposed to being printed out by the computer) severely limits the opportunity for experimenting with new uses of technology because it makes the experiments more expensive.

NON-PRINT MATERIAL

Educators are alarmed at a provision in the library photocopying section which prohibits copying of "a musical work, a pictorial graphic or sculptural work, or a motion picture or other audio-visual work" because they fear this would eliminate even occasional copying of sheet music, charts, maps or other illustrative matter from books for use in class discussions.

AND FINALLY, PHOTOCOPYING

Coming after all this, the objection of librarians to the photocopying

prohibition may seem uncomplicated.

In essence librarians object to one 19-word paragraph [Sec. 108(g)(2)] which proscribes "systematic reproduction and distribution of single or multiple copies or phonorecords of material described..." Combining this with examples given in the draft committee report, the conclusion is that the bill would prohibit all or almost all photocopying currently taking place in interlibrary loan transactions.

Coming on the heels of the Williams & Wilkins decision, it is not surprising that librarians and publishers see a direct connection between the two. The result has been a hardening of the publishers' position on this matter, which they see as essential to the future. Matters have been made worse because of the announcement in April 1974 of a new consortium made up of the New York Public Library, Yale, Harvard and Columbia libraries (calling themselves the Research Library Group) designed to coordinate long-term management decisions made by these institutions. An unfortunate news story in the New York Times14/ on March 24, 1974, made it sound as if the purpose of the group was to exchange hundreds of photocopies of previously held journals every month in an effort to cut periodical subscriptions to the bone. The libraries have strongly denied this, but the rumor persists with the result that publishers have felt even more defensive than before about photocopying.

The essential point the bill fails to take into account is that libraries are not in business to compete with publishers. Libraries provide information to people who cannot obtain the material somewhere else, either because it is not available, inconvenient or prohibitively expensive. Evidence in the Williams & Wilkins case showed that libraries simply are not supplanting a publisher's market when they make a journal available. Whether that journal is delivered to a desk in the reference room or to a library 500 miles away, the circumstances are the same. Photocopying in interlibrary loan at the request of a patron is not going to put anyone out of business.

The case was cogently put by Dr. Edmon Low, director of the New College Library in Sarasota, Florida, and chairman of the American Library Association's Copyright Subcommittee, when testifying before Sen. McClellan's subcommittee in 1973:

"It is usually not known that the interlibrary loan arrangement often encourages the entering of additional subscriptions by the library rather than reducing the number as is often charged. It is a truism that a librarian would rather have a title at hand rather than to have to borrow even under the most convenient circumstances. Consequently, when the time comes around each year to consider the serials list of subscriptions, the record of interlibrary loans is scanned and titles are included from which articles have been requested with some frequency during the year. In our library the number is two: if we have had two or more requests for articles from the same title during the year, we enter a subscription. This not only indicates how the procedure can help the periodical publishers but also indicates that if only one article or none was copied from a title during a year, the journal could not have been damaged materially in the process."15/

The Association of Research Libraries has suggested that the words "so as substantially to impair the market of value of the copyrighted work" should be inserted into the anti-copying clause of the bill, both as testimony to the good faith of librarians and to reflect reality.

But the major problem with the proposed legislation lies in the undefinable term "systematic reproduction."

The National Library of Medicine carries out an extremely efficient -- indeed, a systematic -- photocopying operation. Because they are the country's ultimate medical repository and because they supply thousands of pages of photocopied research (both copyrighted and not copyrighted) to countless numbers of doctors and researchers in hospitals and clinics all across the country they have to be systematic or else they'd drown in requests.

While the same degree of efficiency does not occur in many other libraries, major institutions have employees assigned to handle photocopying requests, regulations governing copying, and a special area where the work is done.

Is this systematic?

Or, to reverse the question, would it be "unsystematic" (and thus legal in the words of the bill) if libraries threw out their union lists and their interlibrary loan codes and just copied on a patch-up basis with nobody sure what to do?

Obviously, the only way to go about photocopying and loaning material, whether copyrighted or not, is "systematically." The task now is to convince Congress and the publishers that this is not a threat to the advancement of knowledge and profits.

What are the chances of this bill, with its prohibition of systematic photocopying, becoming law?

Most people watching Congress agree that, even that if the Senate could agree on the threshold issues of CATV and recording royalties, it is unlikely that the House would act on the bill in this Congress. Thomas Brennan, counsel to McClellan's copyright subcommittee, has said publicly there is "absolutely no chance of passage this Congress." Barbara Ringer, the Register of Copyrights, echoes this judgment.

But it is quite certain that some interim legislation will go through to extend expiring copyrights and to curb record piracy. Ringer has said there is also some talk about the need to establish a special study committee within the Copyright Office to investigate the photocopying problem.

Whatever happens, there is the strong possibility that numerous provisions in any copyright bill which fails in this Congress will continue to come up in succeeding years either re-introduced as a similar revision bill or brought up as individual amendments to the existing law.

For this reason it seems wise that librarians have a working knowledge of the relevant parts of the bill as proposed by the Senate Judiciary Committee on June 11.

Versions of the Committee Report on the bill now making the rounds of Capitol Hill in draft form are little help to librarians. One draft suggests that systematic reproduction occurs when a library makes copies of materials it owns available to other libraries "under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material." Arrangements such as this, the report posits, "may" substitute for subscriptions which libraries would otherwise have to purchase.

The draft goes on to say that, while a specific definition of "systematic copying" is impossible "the following examples serve to illustrate some of the copying prohibited by subsection (g)." The three examples include:

1) a research library's interlibrary loan program which copies articles in biology journals on request in the same way NLM provides copies of medical journal articles.

2) a research center for scientists which provides its staff with photocopies of journal articles much as does NIH.

3) a library system in which each branch library subscribes to specific journals and provides photocopies of articles to the other branches as the Research Libraries Group was allegedly planning to do.

Reprinted here are the pertinent sections of the bill, as reported out by the Senate Judiciary Committee. The danger in the existing wording and the failure to define "systematic" should be evident to every librarian.

[COMMITTEE PRINT]

APRIL 9, 1974

93D CONGRESS
2D SESSION

S. 1361

IN THE SENATE OF THE UNITED STATES

MARCH 26, 1973

MR. MCCLELLAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL REVISION OF COPYRIGHT LAW

SEC. 101. Title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

CHAPTER		Sec.
1.	SUBJECT MATTER AND SCOPE OF COPYRIGHT	101
2.	COPYRIGHT OWNERSHIP AND TRANSFER	201
3.	DURATION OF COPYRIGHT	301
4.	COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION	401
5.	COPYRIGHT INFRINGEMENT AND REMEDIES	501
6.	MANUFACTURING REQUIREMENT AND IMPORTATION	601
7.	COPYRIGHT OFFICE	701
8.	COPYRIGHT ROYALTY TRIBUNAL	801

Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.
101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matters of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: Fair use.
108. Limitations on exclusive rights: Reproduction by libraries and archives.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section, if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,

(3) The reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if:

(1) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee:

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c).

47

CONCLUSION

In some cases, the importance of copyright is vital, is truly a test of survival. If copyright protection should be seriously eroded, the publications simply would cease to exist and a part of the industry would die.

--Curtis Benjamin, President
American Association of Publishers

in Publishers Weekly,
March 11, 1974

I really believe that the copyright proprietors do not sufficiently understand how library systems work, for if they did they would find such systems result in an Increase in purchasing rather than the opposite. It certainly has been true in my area....

--David Sabsay, Director
Santa Rosa-Sonoma County
Free Public Library

in a letter to the Chairman of
the American Library Association
Copyright Subcommittee

There is a certain amount of balderdash in the attack led by Williams & Wilkins against the library world. On the one hand the marketing experts weep crocodile tears for the disappearing journals and the fading profits of the publishers. On the other hand they conjure up pictures of librarians

standing guard over their copying machines, or worse, handing enraged patrons a reprint-house order slip.

Despite claims to the contrary it seems unlikely that Williams & Wilkins, or any other publishers for that matter, wants to cope with the problems of tallying up the debts of the Podunk County Library System's photocopying operation, sending invoices, returning receipts in quadruplicate to municipal treasurers. Nor are they prepared to handle a flood of unrelated requests from all over the world demanding reprints of articles published over the past 65 years.

Advocates of private enterprise have suggested that if libraries would only stop pirating photocopies a flourishing reprint industry would grow overnight to fill the needs of researchers. The argument fails to recognize the obvious fact that reprinters would have to go to the library to get their materials in many instances. And furthermore, no reader is going to wait two weeks for the reprint house to scare up the missing article.

Publishers appear to be simply interested in getting more money for what they are already doing. In the past few years, with the decline in federal support for research and the simultaneous sluggishness of the economy, publishers' markets have shrunk. Offices and institutions which previously held two subscriptions to the same magazine now may take only one and pass it around -- or copy pertinent parts. This hurts the publisher.

One solution is to stop photocopying. But no one really thinks a stronger copyright law will turn off the copying machines in law firms, government agencies, corporation headquarters and all the other places besides libraries where people copy without chipping in 2 cents a page for the publisher.

The other solution is to charge institutions more than individuals for their subscriptions and allow them to copy anything they want. Then, if photocopying really begins to cut into profits, up goes the institutional price.

But a differentiated price system is tricky. There has to be some precedent, some trade-off. From the publisher's point of view the best place to start is by asserting a right to royalties from photocopying. If institutional copying as it's now done can be made illegal, then publishers can magnanimously issue blanket licenses to libraries and other institutions allowing them to make a certain number of copies for a price.

The trend has already begun. Several technical publishers have proposed that subscribers pay an added page cost or a lump sum yearly for the right to make photocopies. Barbara Ringer has stated publicly that she feels the photocopying section of the proposed copyright revision bill now before Congress is "the framework in which blanket licensing will have to come about."

But publishers' complaints about photocopying may only be symptomatic of deeper ills within the industry.

In an incisive article appearing in the March 29, 1974, issue of Science, John Walsh, the magazine's "News and Comment" editor, suggests that the

photocopying problems have occurred because esoteric journals have multiplied so fast they have outstripped their market.16/

"Journal publishing," he wrote, "does not provide a model of logic or efficiency. The years after World War II were a period of unprecedented growth for science and consequently for scientific journals. This growth, of course, has been largely fueled by federal funding. In the case of journals, the government not only underwrites page charges in nonprofit journals but has also subsidized journal income by, for example, making subscriptions chargeable to research grants. Perhaps even more important, funding agencies have found many direct and indirect ways to subsidize the creation of new journals.

"There is no question of the importance of the role of the federal agencies in the expansionary period of journal publishing, and cutbacks in federal science funding in recent years have clearly added to the pressure on journals.

"Many journals now find it difficult to react to these pressures.... The reaction of scientific publishers as a group to increasing costs has been to raise prices at a rate that puts them at the top of all the charts plotting inflation in the periodical field."

The more esoteric the publication, he added, "the smaller the number of potential subscribers and, because of the economics of the game, the more expensive the journal.... (As) prices have gone up, individual subscribers have dropped out, leaving research libraries as the major source of subscription revenue."

To put it bluntly, libraries are being pressed to pay up where government and the subscribers have refused. Photocopying is the initial battle.

What publishers seem not to realize is that libraries cannot blithely pass on the costs to their customers. Libraries are a service. They operate at a loss. The only way to contain that loss is to contain expenses. A normal library can only subscribe to so many journals, can only purchase so many books, can only house so many newspapers. For the less popular or more esoteric item even Yale or the Library of Congress depends on borrowing from other institutions.

A hard-line copyright law and open-ended licensing fees will only succeed in removing more journals from circulation, making the knowledge in them inaccessible to everyone.

And if this happens it will not be just a few scholarly users of technical journals who will be deprived. In the final analysis it will be the public at large that loses its right of access. Information will become the unique property of the seller, doles out only to the select few who can afford it.

FOOTNOTES

1/Barbara Ringer, during a talk before the Federal Library Committee, April 24, 1974.
2/Douglas M. Knight and E. Shepley Nourse, Libraries at Large, New York, R.R. Bowker, 1969, pp. 228-263.
3/HR 2512, 90th Congress, 1st Session, 1967.
4/17 U.S.C. Sections 1 et seq.
5/Knight and Nourse, (op. cit.), p. 257.
6/4 U.S. Statutes at Large 436-9 (1831).
7/16 Ibid. 198-217 (1870).
8/Curtis G. Benjamin, "Everything is not coming up roses." Special Libraries 56: 637-41, November 1965, p. 640.
9/G. Sophar and L. Heilprin, The Determination of Legal Facts and Economic Guideposts with Respect to the Dissemination of Scientific and Educational Information as it is Affected by Copyright -- A Status Report, Washington, D.C., Committee to Investigate Copyright Problems Affecting Communication in Science and Education Inc., December 1967, p. 16.
10/Records of the Copyright Office.
11/Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, 93d Congress, 1st Session, Pursuant to S.Res. 56 on S. 1361, July 31 and Aug. 1, 1973.
12/Teleprompter Corp. et al v. Columbia Broadcasting System, Inc., et al. Slip opinion, March 4, 1974, p. 19.
13/Senate Hearings (op. cit.), p. 292.
14/Eric Pace,"Four Major Libraries Combine Research Operations," New York Times, March 24, 1974.
15/Senate Hearings (op. cit.), p. 105.
16/John Walsh, "Journals: Photocopying Is Not the Only Problem," Science, March 29, 1974, pp. 1274-77.